Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-309 and 88-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF WYOMING,
Petitioner,
v.
UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,
v.
UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

On Petition and Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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JOINT MEMORANDUM OF STATE OF WYOMING AND CITY OF RIVERTON, ET AL., IN REPLY TO OPPOSITION BRIEFS OF THE SHOSHONE AND ARAPAHO TRIBES AND THE UNITED STATES OF AMERICA

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December 5, 1988

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In this reply memorandum, the petitioner, State of Wyoming, Case No. 88-309, and the cross-petitioner, City of Riverton, *et al.*,[1] Case No. 88-553, address certain aspects of the opposition briefs submitted herein by the respondent United States and cross-petitioner Tribes.[2] In addition to raising new arguments concerning the allocation of the burden of proof, the United States and Tribes rely on evidence which is not in the record below and ignore or misstate that record.

I. THE TRIBES AND THE UNITED STATES RAISE NEW ARGUMENTS CONCERNING THE EXISTENCE OF A FEDERAL RESERVED WATER RIGHT IN LIGHT OF CONGRESSIONAL DEFERENCE TO STATE LAW FOR THE ACQUISITION OF WATER RIGHTS FOR THE WIND RIVER INDIAN RESERVATION

The United States' and Tribes' response to Wyoming's Petition as it concerns the intent issue seems to forget that the issue before this Court is whether or not to grant *certiorari* review. Indeed, the very number of substantive arguments set forth by the United States and Tribes on the issue, which go far beyond *certiorari* practice and Wyoming's Petition, strongly suggests that a decision of this Court is needed to resolve those issues on the merits.

a. *Creation of the Federal Reserved Water Right.* Both the United States and the Tribes argue that it is not this, nor any court's, business to look past the circumstances surrounding establishment of a federal reservation to determine whether a federal reserved water

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[1] The cross-petitioners in Case No. 88-553 are as set forth in note 1 of the cross-petition therein. They are collectively referred to herein as "Riverton."

[2] Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes, Nos. 88-309 and 88-553, November 21, 1988, hereinafter "Tribes' Opposition Brief" and Brief for the United States in Opposition, Nos. 88-309, 88-492, and 88-553, November, 1988, hereinafter "United States' Opposition Brief."

right was created to serve its purpose. United States' Opposition Brief, at 9-11; Tribes' Opposition Brief, at 16-18. Each argues that it is sufficient to imply the existence of a reserved water right if the Reservation needs water to achieve its purposes, without further examination of how Congress may have *intended* for water to be supplied. Such "bootstrapping" is, however, precluded by the decisions of this Court which demand a full examination of the intent of Congress to determine "what quantity of water, if any," it may impliedly have reserved. *United States v. New Mexico*, 438 U.S. 696, 698 (1978). *See also Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). Thus, the issue before this Court is not only whether water would be necessary to achieve the Reservation's purpose, but whether Congress expressly intended such water to be secured under the law of Wyoming.

b. *Chronological Perspective.* The Tribes suggest that relying upon the 1905 Act to discern Congress' intent regarding the water rights of the Reservation, lacks "chronological perspective." Tribes' Opposition Brief, at 19. Even leaving aside comment on the strange position that the one statute which deals specifically with acquiring water rights for the Reservation is irrelevant to judge how water rights for the Reservation were to be obtained, the Tribes' argument lacks merit. The use of later Congressional actions to determine prior Congressional intent in the reserved right context has been relied upon by this Court as recently as *United States v. New Mexico*, 438 U.S. at 702-703. The same approach formed one basis of the Ninth Circuit Court of Appeals' analysis in *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921).

In any event, it is the Tribes, in seeking to preclude a discussion of the intent issue, who disregard the historical facts regarding water use on the Reservation. As early as 1876, the Wyoming territorial legislature had codified the right of riparian land owners to use adjoin-

ing waters.[3] Only later, near the turn of the century, after the appropriation doctrine had been established in Wyoming, was desperation over the need to protect the Tribes' water rights from competing appropriations voiced by federal officials.[4] The 1905 Act was Congress' direct response to this concern to assure that the Tribes' water needs would not be imperiled by virtue of competing non-Indian appropriations. It is curious, speaking in 1988, that the Tribes and the United States allege that actions taking place in 1905 lack "chronological perspective" to a complete understanding of this case.

c. *The Purpose of "Securing" Water Rights.* Without any support in the record, both the Tribes and the United States suggest that the purpose of the 1905 Act was merely to "secure" Wyoming water rights to be obtained for the Reservation in the event that reserved water rights did not exist.[5] This rationalization is without foundation. First, the 1905 Act does not, as the Tribes and United States suggest, speak of "securing" water rights in the abstract. The plain language of Article 3 states that the funds devoted to water right acquisition "shall at once become available and shall be devoted to survey,

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[3] Wyo. Comp. Laws, Ch. 65, § 1 (1876). The United States ignores this law in arguing that no means of establishing Tribal water rights existed at the time the Reservation was created. United States' Opposition Brief, note 11.

[4] *See*, for example, Wyo. Exh. WRIR I&P 40, 43, and 49. The Tribes are incorrect when they suggest that a thorough review of the Reservation's history was made below. Like the Tribes, the lower courts ignored the evidence, dismissing it as "lacking perspective." Wyo. App. II, at 437a.

[5] Tribes' Opposition Brief, at 21; United States' Opposition Brief, at page 11. The Tribes cite the testimony of Dr. Iverson in support of their contention regarding the purpose of the 1905 Act. Tribes' Opposition Brief, at 20. Dr. Iverson testified, however, that it was not within the scope of his work to investigate water rights issues presented by the 1905 Act. Tr. at 119, 251-254, April 6, 1980.

platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming *in securing water rights from such state* for the irrigation of such lands as shall remain the property of the Indians. . ." (emphasis added). From the very words of the statute, it is apparent that "securing" water rights from Wyoming simply means "obtaining" such rights, nothing more. Second, the legislative history of the 1905 Act reveals that Congress rejected an attempt to create a limited reserved water right for the Reservation.[6] The United States argues that Congress rejected this proposal simply to avoid delay in the opening of the Reservation. United States' Opposition Brief, note 12. Can it logically be said that a Congress concerned about delaying the opening of the Reservation by the limited withdrawal of Reservation waters from appropriation would have agreed to the vast reserved water right now claimed by the United States and Tribes? Third, the contemporaneous administration of the 1905 Act reveals that permits to irrigate nearly 150,000 acres on the Reservation were obtained. There was no suggestion at any time prior to the 1905 Act, or between 1905 and 1908, the year of the *Winter's* announcement, that

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[6] The Tribes assert that Congress could not have meant to fulfill its treaty obligations to the Tribes by causing an expenditure of the Tribes' "own proceeds." Tribes' Opposition Brief, note 21. In fact, in the negotiations which resulted in the agreement which the 1905 Act confirmed, it was the *Tribal spokesman* who asked that as much money as possible be set aside to secure water rights for the Reservation. Wyo. Exh. WRIR I&P 8, at 19. Furthermore, the 1905 Act also earmarked an additional $150,000 of the sale proceeds to construct irrigation facilities, an additional $50,000 for the purchase of livestock, an additional $50,000 for a school fund, and all remaining sale proceeds to a general welfare fund. *See* Articles 4, 5, 6, and 7. In making the assertion they do, the Tribes also forget that Congress appropriated over $2,000,000 in the years after 1905 to construct irrigation facilities on the Reservation. Those appropriations were unrelated to the sale proceeds obtained under the 1905 Act.

water rights for the Reservation were to be obtained other than under Wyoming law. The Tribes and United States persist in reading *Winters* as somehow overturning the 1905 Act, rather than recognizing the Act as an express Congressional alternative to the implication of a reserved water right. Finally, the Tribes and United States conveniently ignore the fact that, by 1905, Congress had expressly created reserved water rights on behalf of the Fort Hall, Crow, and Mission Indian Reservations.[7] Within one year of the 1905 Act, Congress again created an express reserved water right, for the Yakima Reservation in Washington.[8] Congress was, indeed, adept at "securing" the federal reserved water rights of Indian reservations by express legislation in 1905. The 1905 Act reveals that it was equally adept at employing state law to the task.

d. *Gallon-for-Gallon Reduction.* It is also dangerously misleading to suggest, as have the Tribes, at Footnote 7 and the accompanying text of their opposition brief, that enforcement of the reserved water right on the Reservation will result in "virtually no water loss to non-Indian irrigators." The fact is that this summer, state water users were damaged by exercise of reserved water rights of an amount far less than the reserved water right awards for "historic" lands by the decree below. Those rights did *not* include the use of one drop of the approximately 210,000 acre-feet of water awarded for "future projects." As the master below found, absent storage, water for the future projects will come from the ditches and reservoirs of Wyoming users.[9]

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[7] *See*, respectively, Act of June 6, 1900, Article VIII, 31 Stat. 672; Act of April 27, 1904, Article V, 33 Stat. 352; Mission Indian Relief Act of 1891, 26 Stat. 712.

[8] Act of March 6, 1906, § 5, 34 Stat. 53.

[9] Wyo. App. H, pp. 629a, 630a, 688a-690a. These findings remain entirely undisturbed.

e. *The Decisions in United States v. Parkins*[10] *and United States v. Hampleman.*[11] Finally, the Tribes and the United States argue that the issue of whether a federal reserved water right exists on behalf of the Reservation has been settled by *United States v. Parkins* and *United States v. Hampleman.* The Wyoming Supreme Court, however, rejected the interpretations of the cases offered by the Tribes. This is unsurprising since *United States v. Parkins* was a lawsuit by the United States to enjoin Parkins from diverting on the Reservation to the detriment of the United States' *appropriative* water rights under Wyoming law. No reserved right was at issue. The United States District Court enjoined Parkins' diversions on four bases, only one of which addressed the topic of federal reserved water rights and which, in doing so, merely assumed that such existed on behalf of the Reservation. *United States v. Parkins*, 18 F.2d 642 at 643. For its part, the *Hampleman* decree does not even allude to the issue of reserved water rights for the Reservation.[12] It is a decision concerning regulatory jurisdiction only. In any event, if the United States is prepared to argue that these cases settle the issue of reserved water rights on the Reservation, they must also be bound, as a matter of *res judicata*, by the absence of any claim or decree in either recognizing reserved water rights for any purpose other than to serve the agricultural purpose of the Reservation.

II. THE TRIBES RELY ON EVIDENCE NOT IN THE RECORD CONCERNING THE RESERVATION'S "NEEDS" FOR WATER

The Tribes represent that the reserved water right is for water which "is desperately needed to improve the

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[10] 18 F.2d 642 (D. Wyo. 1926).

[11] Case No. 753 (D. Wyo. June 26, 1916).

[12] Wyo. Exh. WRIR I&P 34.

economy on the Reservation." [13] There is absolutely no evidence, let alone a finding by the trial court below, that this is true. The Tribes' argument seems to be that, as a matter of law, every Indian reservation has a desperate need for all the water which can be used for the irrigation of any practicably irrigable land on the reservation. Nevertheless, the Tribes point to no decision of this or any other court which so holds. Each decision relied upon by the Tribes is addressed to the specific fact situation confronted by the court rendering that decision. The Tribes fail to demonstrate that the instant fact situation is indistinguishable from those involved in the cited decisions.

III. THE TRIBES RAISE NEW ARGUMENTS CONCERNING THE ALLOCATION OF THE BURDEN OF PROOF WITH RESPECT TO THE APPROPRIATE STANDARD OF QUANTIFICATION OF THE RESERVED RIGHT AND THE PRIORITY DATE FOR REACQUIRED LANDS

The Tribes assert that the State of Wyoming failed to establish the amount of water which should have been awarded under the "minimal needs" or "moderate living" standards for the quantification of the reserved water right.[14] Similarly, the Tribes suggest that the State should have put on evidence as to whether reserved water rights on reacquired lands had "been lost through nonuse." [15] In both instances the Tribes fail to understand that evidence in support of the Tribes' claims must be adduced by the Tribes themselves or the United States.

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[13] Tribes' Opposition Brief, note 37.

[14] "[T]he State never proffered any evidence at all to support the assertion that the amount of reserved water quantified under the PIA standard exceeded the 'minimal needs' or 'moderate living' requirements of the Indians." Tribes' Opposition Brief, at note 37.

[15] *Id.*, at page 38.

Throughout the adjudication below, the State consistently asserted that "minimal needs" or "moderate living" was the appropriate standard for the quantification of the reserved water right. The Tribes now suggest that, having done so, the State was obliged to put on evidence in support of those rights.[16] Having elected to ignore the appropriate standard, the Tribes cannot now complain that no one else proved up their reserved water right. In the same vein, the Tribes seem far off the mark in arguing that someone else should have proved that their reserved water right had or had not been continuously used on reacquired lands.

IV. THE TRIBES IGNORE THE EVIDENCE OF RECORD WHICH CONCLUSIVELY DEMONSTRATES THAT THE SOURCE OF FUNDING FOR THEIR "FUTURE PROJECT" WILL BE FROM THE FEDERAL GOVERNMENT

The Tribes categorize as "sheer speculation" the argument by Riverton that future irrigation projects would be implemented "only by obtaining federal funds."[17] Perhaps the same could be said of the entirety of the Tribes' "future" claims which were supported by the testimony of the very same witness, called by the Tribes, who testified, "the source of the money is the Federal Government . . . ." Tr. at 5078. For the Tribes now to argue that the appropriate discount rate is other than that prescribed by federal statute is to turn a blind eye to their own evidence.

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[16] In fact, the State consistently asserted that the evidence of seventy-five years of intensive historic irrigation on the Reservation established the level of "minimal needs." Wyoming's Amended Proposed Master's Report, May 5, 1982, Vol. III, p. 1.

[17] Tribes' Opposition Brief, at page 43.

V. THE UNITED STATES MISINTERPRETS THE RECORD BELOW IN SUGGESTING THAT THE STATE DID NOT TIMELY RAISE THE *ANDERSON* ISSUES

The United States argues that the conflict concerning priority dates between the decisions of the Wyoming Supreme Court herein and that of the Ninth Circuit in *Anderson*,[18] was the result of the failure of the State to raise the issue below.[19] This misstatement is undoubtedly due to the Solicitor's understandable unfamiliarity with the extensive record. The State consistently asserted before the master,[20] the trial court [21] and the Wyoming Supreme Court [22] that the priority date for water rights associated with reacquired homesteaded lands should be no earlier than the date of reacquisition or the date established under state law.[23]

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[18] *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

[19] United States' Opposition Brief, at page 22.

[20] Wyoming's Amended Proposed Master's Report, May 5, 1982, Vol. V, pp. 166-67.

[21] Wyoming's Brief in Support of Motion for Action upon the Special Master's Report on Indian Reserved Rights Claims, March 18, 1983, p. 60, note 184.

[22] Brief of Appellant State of Wyoming (Type I Claims), December 2, 1985, pp. 132-133.

[23] Obviously, since *Anderson* was not decided until 1984, after the trial court decision, the Ninth Circuit's opinion was not cited by name except to the Wyoming Supreme Court.

CONCLUSION

In light of the inability of the Tribes and the United States to face the issues presented in the State's petition and Riverton's cross-petition without misstating the record below, the need for review of the decision below is indisputable.

Respectfully submitted,

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